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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. DONALD LEE ADKINS, Defendant and Respondent.	E065487 (Super.Ct.No. SWF012260) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Michael A. Hestrin, District Attorney, Donald W. Ostertag, Deputy District Attorney, for Plaintiff and Appellant.

Marianne Harguindeguy, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from the superior court's order granting defendant and respondent Donald Lee Adkins's petition to recall his sentence under Proposition 47. (Pen. Code, § 1170.18.)[1] We affirm.

FACTS AND PROCEDURE

On June 20, 2005, defendant entered a bank in Hemet and attempted to cash a $300 check written on the account of a person who had died on May 17, 2005. The teller recognized the name on the check, knew that the person had died, and found that the signature on the check did not match the signature card. The teller asked defendant for his identification. While the teller was away from the counter, defendant walked out of the bank, leaving the check and his identification. Defendant was arrested shortly thereafter.

On June 22, 2005, the People filed a complaint charging defendant with second degree burglary (§ 459) and forgery (§ 470). The People alleged defendant had a prison prior (§ 667.5, subd. (b)) and that he violated his probation.

On August 2, 2005, defendant pled guilty to second degree burglary. The court placed defendant on three years of formal probation, with the included condition that he serve 365 days in jail with credit for 66 days.

On March 31, 2015, defendant filed a petition for resentencing under section 1170.18, asking the court to reduce the second degree burglary conviction to a misdemeanor.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

On August 3, 2015, the People filed opposition, arguing the bank is not a "commercial establishment" under section 459.5.

The court held a hearing on the matter on January 22, 2016. The People argued defendant does not qualify for the sentence reduction because (1) the bank is not a commercial establishment, and (2) defendant entered the bank intending to commit felony identity theft in violation of section 530.5, rather than larceny. The court granted the petition, reasoning that the crime was a forgery under $950 and that a bank is a commercial establishment.

This appeal by the People followed.

DISCUSSION

The Legal Framework

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhood and Schools Act, which became effective November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, sections 1170.18 and 459.5. Section 1170.18 creates a process permitting persons previously convicted of crimes as felonies, which might be misdemeanors under the new definitions in Proposition 47, to petition for resentencing. (*Id.* at pp. 1091-1092.)

Section 1170.18, subdivision (f), provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of

the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." And, subdivision (g) of section 1170.18 provides that "[i]f the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

Penal Code section 459.5 was among the provisions added by Proposition 47. It reduces certain second degree burglaries to misdemeanors by defining them as "shoplifting," that is, "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).)

We review a trial court's "legal conclusions de novo and its findings of fact for substantial evidence." (*People v. Trinh* (2014) 59 Cal.4th 216, 236.) The interpretation of a statute is subject to de novo review on appeal. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) "In interpreting a voter initiative like [Proposition 47], [the courts] apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) " 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]' " (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) "In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however,

we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

Arguments and Analysis

The People first argue that defendant did not meet his burden to establish in his petition his eligibility for relief, including that the check was for an amount less than $950. Defendant in turn argues the People forfeited the right to raise this issue on appeal because they did not challenge any such lack of evidentiary support in the trial court. In fact, the People went further than failing to raise the issue of evidentiary support in the trial court—they effectively conceded at the hearing that the check was for $300. The prosecutor stated at the hearing that "what happened was the defendant entered the bank attempting to cash a check from an account belonging to a person who was deceased for [$]300." In addition, the People successfully sought to have the appellate record augmented with the police report, which also sets the amount of the check at $300. The record in the trial court and on appeal plainly establishes the burglary was for an amount less than $950, with the People's concession in the trial court and evidence in this appeal supplied by the People.

The People further argue, as they did in the superior court, that defendant both entered the bank with the intent to commit felony identity theft rather than larceny, and

that the bank was not a "commercial establishment" within the meaning of section 459.5.[2]

In the felony complaint, the People charged that on June 20, 2005, defendant "willfully and unlawfully enter[ed] a certain building . . . with intent to commit theft and a felony" in violation of section 459 (count 1). In count 2, the People charged defendant with forgery in violation of section 470, in that "he did willfully and unlawfully, falsely make, alter, forge and counterfeit a check, and did utter, publish, pass and attempt and offer to pass the check as true and genuine, knowing the same to be made, altered, forged and counterfeited, with the intent to defraud." Both of the charges are interrelated in that defendant entered the bank and attempted to cash a forged check in the amount of $300. The People did not charge identity theft. Defendant entered a plea to count 1, second degree burglary. Identity theft was not placed in issue at the time of the plea.

In *People v. Abarca* (2016) 2 Cal.App.5th 475, 483-484, review granted August 12, 2016, S237106 (*Abarca*), we relied on the convicted offenses, not offenses that could have been filed but were not, such as identity theft. We noted that Proposition 47 provided a petitioning procedure by which an offender could seek resentencing on felony convictions that qualified under Proposition 47. Defendant here was not convicted of identity theft. We will not look behind defendant's actual convictions to find an

[2] The People's argument is based in part on this court's opinion in a case that is no longer citable because of the Supreme Court's grant of review, which issued after the People's brief in this matter was filed. (*People v. Bias* (2016) 245 Cal.App.4th 302, review granted May 11, 2016, S233634.)

uncharged crime that would make him ineligible. (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1427-1428; *People v. Maestas* (2006) 143 Cal.App.4th 247.)

The trial court's determination that defendant was entitled to redesignation of his second degree burglary conviction to a misdemeanor was based on the finding that his conviction was predicated on his intent to commit forgery. On review, we indulge in every presumption to uphold the judgment and look to the appellant to show error. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) For the reasons stated in *Abarca*, *supra*, 2 Cal.App.5th 475, we reject the People's contention that defendant is ineligible for resentencing.[3]

The People also contend that defendant is not entitled to resentencing because a bank is not a "commercial establishment" within the meaning of section 459.5. That term is not defined in the Penal Code, and the People urge us to adopt a commonsense meaning, which would be its plain, ordinary meaning. The People contend that the voters intended to limit shoplifting to theft crimes of establishments which have goods for sale.

In *Abarca, supra,* 2 Cal.App.5th at pages 481-482, we rejected the same argument, noting that the term "commerce" is normally defined as the exchange of goods and services, and the term "establishment" is defined as a place of business. We explained: "Banks satisfy this definition. Bank customers use banks to deposit and withdraw funds in exchange for fees. In the context of approving banks' ability to collect fees from non-

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[3] We note that the meaning of larceny as used in section 459.5 is on review by the California Supreme Court. (*People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171.)

depositors who use their automatic teller machines, the U.S. Court of Appeals for the Ninth Circuit noted '[t]he depositing of funds and the withdrawal of cash are services provided by banks since the days of their creation. Indeed, such activities define the business of banking.' (*Bank of America v. City & County of San Francisco* (9th Cir. 2002) 309 F.3d 551, 563.) Thus, a [bank] provides financial services in exchange for fees, and is therefore a commercial establishment within the ordinary meaning of that term." (*Abarca, supra*, 2 Cal.App.5th at pp. 481-482.) A bank, therefore, is a commercial establishment. We follow our precedent in *Abarca*, and reject the People's argument. (*Ibid*.)

DISPOSITION

We affirm the order granting defendant's petition to recall his sentence.

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CUNNISON*****
J.

We concur:

RAMIREZ
P. J.

MILLER
J.

***** Retired judge of the Riverside Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.